IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 601 OF 1998

Gopal Singh Sohabraj Singh]
Adult, Indian Inahbitant of]
Bombay, at present residing at]
Mehta Chawl, Caves Road,]..Appellant
Jogeshwari (East), Bombay 400060](Ori.Plaintiff)

versus

1. Nanabhoy Byramji Jijibhoy]
   also adult, Indian Inhabitant]
   of Bombay, having his office]
   at Ballard House, Ballard]
   Estate, Mangalore Street,]
   Bombay -38]
2. Smt. Dosibai N.B. Jijibhoy]
   also adult, Indian Inhabitant]
   of Bombay having her office]
   at Ballard House, Ballard]
   Estate, Mangalore Street,]
   Bombay -38]
3. Byramji Jijibhoy & Co.]
   having his office at Ballard]
   House, Ballard Estate,]
   Mangalore Street, Bombay -38]

4. M/s. Tolaram & Co. Kukreja]
   Construction Co., Trishul]
   Apartment, Sindhi Society,]
   8th Lane, Chembur, Bombay]
5. Madhu Builders Pvt. Ltd.]
   83, Jolly Makers Chamber II]
   Marine Lines, Bombay 400 021]
6. Madhusudan Brijlal Vakharia]
   Director of Defendant No.5]
   having same address as of]
   Defendant No.5.]
7. District Collector, Bombay]
   and Bombay Suburban District,]
   having office at second floor]
   B.M.R.D.A. Building,]
   Bandra(E), Bombay 400 051]
8. Vishambar Khemchand Gorumal]
   Suleman Chambers, 3rd floor,]
   Battery Steel Behind Regal]
   Cinema, Fort, Bombay 400001]
9. Rustomji Dorabshah Dubash]
   address at Defendant No.1]
10 The Municipal Corporation of]
   Greater Mumbai, a Corporation]
   constituted under the]
   provisions of Bombay Municipal]
   Corporation Act, 1888, and]
   having its office Opp: V.T.]

Railway Station, Mahapalika]
Marg, Bombay 400 001]
11 M/s. Madhu Fantasy Land Pvt.]
Ltd. a company established]
under the provisions of the]
Companies Act and having its]
Registered office at 83,Jolly]
Maker Chambers II, Nariman]..Respondents
Point, Mumbai 400 021](Ori.Defendants)

Mr. R. R. Singh for the Appellant.
Mr. Navin Parekh with Hetal Patel for the Respondent No.4.
Mr. J. F. Daruwalla with Ms. Vinita Parab for Respondent Nos. 5, 6 and 11.

CORAM : D. G. DESHPANDE,J.
DATE : 20TH APRIL,2005

ORAL JUDGMENT :

1. Advocates for the parties i.e. Appellant and the respondents No.4 and Respondent Nos. 5, 6 and 11 gave their written submissions or written arguments and therefore this Appeal is being decided on the basis of the written arguments.

2. Appellants Advocate gave 6 pages written

arguments or written submissions dated 7.3.2005 and in addition another submissions dated 28.1.2005, whereas written submissions on behalf of Respondent No.4 and Respondent Nos. 5, 6 and 11 were separately submitted.

3. The appellant is the original plaintiff. His suit before the City Civil Court vide Suit No.4903 of 1992 came to be dismissed as was found to be totally false suit and therefore this Appeal. The Plaintiff is claiming title to the suit land comprising of 67 acres of land by adverse possession. According to the plaintiff his father was earlier in possession of the property i.e. since 1947 and therefore the title of the father in respect of the 67 acres of land was perfected by adverse possession in 1959 and Plaintiff - Appellant continued to be in possession after the death of his father. The Plaintiff apart from seeking declaration of ownership by adverse possession also sought for declaration or for cancellation of several documents executed between defendant No.1 to 3, 6 and 8. These documents being dated 24.7.1951, 11.3.1967, 24.10.1974, 27.11.1974, 3.02.1975, 10.11.1985, 16.1.1988, 17.1.1988 and 28.1.1982 as sham and bogus documents executed with an intention to defeat the plaintiff’s claim upon the suit property. The plaintiff adduced oral as well as

documentary evidence but the trial court found that the suit was false and therefore the suit came to be dismissed, against which the present appeal is filed.

4. In the written submissions / written arguments dated 28.1.2005 the advocate for the appellant has raised following contentions :

1. Respondent Nos. 1, 8, 9 and 10 did not file their written statement, therefore their case was covered by Order VIII Rule 10 of the Code of Civil Procedure and therefore judgment should have been passed against them under the said provision.

2. Against Defendant Nos. 2, 3, 7 and 11 there were no issues either on the points of law or facts, hence judgment ought to have been passed against them under Order XV Rule 1 and 2 of Civil Procedure Code.

3. When there was no written statement of respondent No.10, the trial court erroneously framed issue when in fact in the absence of written statement by defendant No.10 decree should have followed.

4. As against the Respondents who did not enter in the witness box, the decree should have automatically followed under Order XVII Rule 3 of Civil Procedure Code.

So far as plea of possession is concerned, the plaintiff as per those written notes or arguments relied upon (1) record of the Criminal Court at Andheri, page No.19 and 20 of paper book, (2) Records of Small Causes Court in RAE/R Suit No. 616/5/03/64 on page No. 20 of paper book, (3) Records of the City Civil Court in Suit No. 5483/63 on page No. 19 of the paper book. Therefore, according to the plaintiff there was sufficient evidence on record to hold that the plaintiff was in possession and the possession was adverse to the owner and therefore he was entitled for a decree claimed.

5. In another notes of arguments, it is contended that the plaintiff is successful in proving hostile possession. Then further different pieces of evidence have been referred to by the plaintiff in support of this contention raised in the suit.

6. In their written statement the respondent No.4 contended that the plaintiff - appellant has

lost sight of the basic legal requirement that he can succeed on the strength of the case made out by him and cannot rely upon the weakness of the case of the Defendants. Secondly as regards adverse possession, strong, satisfactory and unimpeachable evidence must be led to establish adverse possession to defeat the rights of the title holder. Thirdly, the appellant failed to prove that the documents executed between Defendant Nos. 1 to 3 and 8 were sham, bogus and concocted with intention to defeat the claim of the appellant to the suit land, and there was no burden upon the defendants - respondents to prove their case and that the suit was rightly dismissed.

7. In their written submissions the Respondent Nos. 5, 6 and 11 have contended that the suit of the plaintiff was abated, that the suit was barred and issues No.1 and 2 which were the main issues were held against the plaintiff and therefore the case of the plaintiff was rightly dismissed by the court.

8. I have gone through the respective submissions of the appellant, respondent No.4 and the respondent Nos. 5,6 and 11, and at the outset it has to be stated that there is no merit in the appeal and it deserves to be dismissed.

9. So far as legal objections of the appellant to the decree are concerned, as stated by me earlier, according to him if defendant Nos. 1 ,9 and 10 had not filed their written statement then under Order VIII Rule 10 judgment ought to have been passed against them. Rule 10 of Order VIII was amended and was deleted by Amendment Act of 1999. Prior to the amendment in a cases where the defendant did not file written statement, the court had two alternatives (a) the court may pronounce the judgment or (b) the court may make such order as it thinks fit. Therefore it is not that in a every case where the defendant does not file written statement, the court was bound to pass a decree as prayed. It was within the powers of the court to pass such order as it thought fit. Therefore there is no substance in this objection. Similarly, according to the appellant the decree should have followed against the respondents who were not at issues i.e. respondent Nos. 2, 3, 7, 11 and 10. This according to the appellant ought to have been done under Order XV Rules 1 and 2. Rule 1 of Order XV lays down that issues arise when the material proposition of facts is affirmed by one party and denied by the other and Rule 2 lays down that the court shall subject to provisions of the sub rule 2 pronounces the judgment on all issues. It may be

open to the court in a given case to proceed against the defendants who had not filed their written statement but Rule 4 gives power to the court to examine witness or documents before framing issues. Admittedly this was a case where the plaintiff was claiming adverse possession in respect of a vast land of 67 acres and if the court had not chosen to proceed against the defendant Nos. 2, 3, 7, 11 and 10, then no fault could be found with it by this court. The ultimate judgment on merits after scrutinising the evidence of the plaintiff, cannot be faulted with.

10. The next legal objection of the appellant was that those respondents who had not entered the witness box, a decree should have followed under Order XVII Rule 3 of CPC. Rule 3 gives power to the court and it lays down that where any party to a suit to whom time has been granted fails to produce his evidence.....then the Court may, notwithstanding such default,- (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or any of them is, absent, proceed under Rule 2. Rule 2 provide that where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order

IX or make such order as it thinks fit. This sub rule 2 also does not make it obligatory upon the court to pronounce the judgment then and there and in no case it can be contended that the court should accept the case of the plaintiff without going into the merits of his claim and contentions and decree the suit. Powers are there and they are to be there to enable the court to find out whether the case of the plaintiff is really genuine, false, bogus etc. Therefore there is no substance in all the three legal submissions.

11. So far as the facts are concerned, the plaintiff is claiming adverse possession in respect of 67 Acres of land in the plaint. He has stated that he is the owner of the suit land and the ownership came to his father by virtue of Section 27 / 28 of the Limitation Act. In as much as the father was in possession of the suit lands since or prior to the year 1946. The ownership of defendant No.1 over the suit land is admitted but the most important thing that is lacking in the plaint is the plaintiff has nowhere stated when the father started asserting hostile and adverse title to the knowledge of the real owner, the father of the plaintiff may be in possession of the lands since 1947 but mere possession howsoever long, does not constitute adverse possession. The plaintiff should have

alleged and given particulars of the year from which the father started exerting his right of adverse possession to the knowledge of the defendant - real owner. Those pleadings are not there and therefore the case of the plaintiff does not satisfy the legal requirements in that regard.

12. Secondly, regarding possession, the plaintiff tendered documentary as well as oral evidence. The trial court found that so far as the revenue record was concerned, none of the suit property was in the name of the plaintiff's father or the plaintiff in any portion of any survey numbers constituting the suit property, therefore the revenue records do not support the claim and contention of the plaintiff regarding possession of entire 67 Acres of land or any part thereof. further the plaintiff has nothing with him to show that he had paid land revenue or that he has filed income tax returns as Karta of HUF or that he has filed returns under Section 6 of the Urban Land Ceiling Act as owner of the property.

13. The plaintiff also relied upon a suit filed by one Khemchand being Suit No. 5482 of 1963 and affidavit filed by his Advocate Pathare. That suit was filed by Khemchand as a sub lessee of 25 acres of land at Mauje Majas, Jogeshwari, Bombay being

Survey No. 13, 39, 40 and 57. In that suit the plaintiff's father was the defendant along with others. The trial court perused the original affidavit filed by Advocate Pathare in that suit and found that the name of the plaintiff's father was not shown in respect of survey No.40/4 and it was clear that the plaintiff had no record either in his favour or in favour of his father in respect of the suit property atleast in that suit. Then plaintiff relied upon different Criminal Cases but there were no documents produced in that regard by the plaintiff. In the written submissions made by the plaintiff the record of criminal case page Nos. 19 and 20 of paper book is referred to. But in the paper book which is along with this appeal paging starts from page 62 in the additional compilation tagged with the paper book starts from 134 to 335, and then there is compilation filed by the respondents along with written submissions. Nowhere in the papers of this appeal these two documents are to be found.

14. It was the case of the plaintiff that his father had constructed different structures and stables on the suit property and also structures for a number of labourers employed by the plaintiff's father. He has also relied upon demand notice Exhibits B and O collectively issued by BMC with

regard to the suit structure. But as rightly observed by the court, these documents do not show whether the suit structure or tiled shed was on any portion of the suit land. Then according to the plaintiff further they were growing vegetables or grass in the entire 67 Acres of land.

15. Crucial question in this case is not whether the plaintiff is in possession or was in possession of the suit property. Crucial question is whether the plaintiff was in adverse possession and his title to the land was perfected by adverse possession. None of the documents of the plaintiff if they are accepted as it is, throw any light on this vital issue. To the contrary from the obstructionists proceedings in RAE Suit No. 615/5102/64 vide obstructionists notice No. 583 of 1971 it appears that there were more than 200 obstructionists in those proceedings, which on the face of it shows that claim and contention of the plaintiff that he was in exclusive possession of 67 Acres of land, was not correct.

16. The land is situate in a very thickly populated area like Borivili. It is a heap of land extending into 67 Acres and if the plaintiff was in occupation and possession for the last more than 50 years then he should have atleast more than hundred

documents in his possession to show that he has exerted or he was exercising ownership rights over the suit property. No such document regarding ownership right over the suit property against the interest of the original owner have been filed on record.

17. Therefore this is a case where firstly the trial court has rightly appreciated the evidence and rejected the claim and contention of the plaintiff. Secondly, it is a case where the plaintiff is trying to seek a declaration or cancellation of scores of registered conveyances which came be executed long long back before the filing of the suit in 1992 by a stroke of pen and in a single prayer that the court should cancel all those documents. Those documents to the contrary show that the defendants were exercising their ownership right over the property to the knowledge of the plaintiff and detriment to the interest of the plaintiff. Those documents which are sought to be cancelled are of 1976, 1951, 1967, 1974 up to 1988 but there is no explanation why the plaintiff if he was the owner of the property and his title was perfected by adverse possession in 1959 itself did not take any steps for all these years to seek any injunction against the defendants from exercising ownership rights over the property. Regarding all these documents the

plaintiff in paragraph 20 of the plaint has stated as under:

> *".....Under these circumstances if any of the defendant executes any documents whatsoever it may be sham / bogus and concocted document liable to be quashed and cancelled.."*

In paragraph 18 the plaintiff had made reference to document of 1952 i.e. assignment of rights of Defendant No. 9 and executed in favour of defendant No.2 without any right and therefore it is sham and bogus. It is easy to make any claim in any suit before any court, therefore the plaintiff in his suit filed in 1992 by writing two sentences or making two averments would claim that all the documents of the period between 1952 to 1988 were sham and bogus and still the plaintiff wants to contend that the court should have decreed the suit if the defendants did not file their written statement or they do not enter the witness box. No civil court will not an ordinarily pass a decree of ownership by virtue of adverse possession only because the defendants failed to appear and by accepting the allegations in the plaint. There is no merit in this Appeal. Hence, I pass the following order :

ORDER

Appeal is dismissed with costs throughout.

. Certified copy expedited.

20.04.2005 (D.G. DESHPANDE, J.)